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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 103

THE GOSPEL ARMY, a corporation,

Appellant,

vs.

THE CITY OF LOS ANGELES, BOARD OF SOCIAL SERVICE COMMISSIONERS, DEPARTMENT OF SOCIAL SERVICE, and DAN O. HOYE, City Controller,

Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

Introduction.

The case at bar presents the novel situation of a *corporation* contending that the First and Fourteenth Amendments to the Constitution of the United States afford it immunity from regulation of its secular activities because a portion of the income therefrom is devoted to the support of religious activities carried on by the corporation. If, as appellant contends, it may engage in the business of dealing in secondhand articles or in junk free from regulation because a part of its income therefrom is used for the distribution of religious tracts and New Testaments, and the holding of two or three religious

services each week, it follows as a logical conclusion that any corporation organized under the laws of the State of California as a "non profit corporation" may engage in the business of operating dance halls, skating rinks, shows, "fire sales," pool halls, liquor establishments or any other similar activity free from all police regulation customarily imposed upon such activities if a part of the income therefrom is devoted to the "practice of religion."

Appellant urges the invalidity not only of all sections of the ordinance regulating charitable solicitation but also of the section regulating secondhand dealers and junk dealers. Nowhere in the record does it appear that there has ever been a request that appellant comply with regulations governing secondhand dealers or junk dealers, or that it comply with the provisions of the charitable solicitation regulations except in so far as the operation of its industrial department is concerned.

Opinion Below.

The opinion of the Supreme Court of the State of California is reported in ~~28~~ 27 Cal. (2d) 232.

Statement of the Case.

The appellant, The Gospel Army, is a corporation [Complaint, Tr. p. 1, par. I]. Examination of the files of the County Clerk of Los Angeles County, California, discloses that such corporation was originally incorporated in the District of Columbia in August, 1905, as a charitable corporation under the provisions of Subsection 3 of Part 18, Code of the District of Columbia (31 Stats. Ch. 854, Sec. 599, p. 1283). It is to be noted that it is Subsection 2, Part 18 of such code which provides for

incorporation of "religious societies" (churches) (31 Stats. Ch. 854, Sec. 587, p. 1282 *et seq.*).

The powers of the corporation, as stated in the Articles of Incorporation, are as follows:

> "The particular business and objects of The Gospel Army shall be for the support and promotion of benevolent and charitable objects and institutions, to conduct religious services, to visit and minister to the sick and needy, to care for widows and orphans, to rescue the fallen, to open up and maintain shelter and food stations for temporary relief of the homeless and needy, and generally to do those things needful for the promotion of religion, morality and charity. It will for said purposes form and establish branch societies through its officers and agents appointed and delegated for that purpose, in different parts of the District of Columbia, and in different States and Territories of the United States of America, and will adopt by-laws and regulations for the government of said branch associations not inconsistent with the laws and Constitution of the United States nor of any state or territory."

Although given the power to hold religious meetings, the primary purpose of the corporation appears to be the promotion of charity.

The character of a corporation is to be determined from its charter, constitution and by-laws (*Vanderbilt v. Commissioner of Internal Revenue* (C. C. A. 1), 93 F. (2d) 360), but the fact that it is incorporated as a charitable

institution is not conclusive proof that it is such in fact. (*White v. Central Dispensary etc.*, 69 App. D. C. 122, 99 F. (2d) 355).

The Supreme Court of California in its decision epitomizes the record [Tr. pp. 79-80, fols. 127-129]. It is deemed advisable, however, to call particular attention to the following facts:

Although the basis of appellant's argument is that it is engaged in religious practices, the only evidence of truly religious work performed by the corporation or its members is that it furnishes tracts, the number and cost of which is not shown, to be distributed by its solicitors of money [Tr. p. 21, fol. 37], and that during its existence it has distributed 300 New Testaments to members of the armed forces, the cost of which does not appear [Tr. p. 21, fol. 37]. Whether such distribution was over the entire span of the life of the corporation or during World War II, we cannot determine.

In addition to the activities above named, the appellant rents a place as a mission, where a Mr. Perigo holds services twice a week without compensation from the corporation [Tr. p. 18, fol. 33; p. 47, fol. 75; p. 49, fol. 79]. The money solicitors distribute the tracts in the course of their solicitation for funds, for which they receive compensation on the basis of 30 per cent commission [Tr. p. 21, fol. 37; p. 28, fol. 47; p. 50, fol. 79].

Statement of Questions of Law Involved.

Excluding questions bearing only upon the matter of jurisdiction, examination of the record shows that the only question involved is the right of appellant to operate, free from regulation, an industrial department which collects personal property, some of which is placed in the office or warehouse of such department primarily for sale, the remainder being sold to mills. Ten per cent only of the proceeds from the sale to mills is given to the appellant.

It appears proper to correct what is no doubt an inadvertent statement concerning the sections of the Los Angeles Municipal Code made by appellant in its statement of jurisdiction at page one thereof:

> "The state statute involved in this case is Ordinance No. 77,000 of the incorporated City of Los Angeles, California, which ordinance is entitled 'Charities.' It contains nineteen sections, some of which have many subdivisions, the 19th containing 33 subsections, the last 28 of which regulate 'Pawnbrokers, Second Hand Dealers, Junk Dealers, Collectors,' and said ordinance, through the provisions of said sections, purports to regulate all public solicitations of donations for charitable purposes and it prohibits any such solicitations without strict compliance with its provisions, and violations thereof are made punishable as penal offenses."

The plain import of such statement is that the provisions relative to pawnbrokers, etc., are intended to supple-

ment or control the provisions relative to solicitation of charity. However, such is not a fact. The Los Angeles Municipal Code (Ordinance No. 77,000) is divided into chapters, which in turn are divided into articles. What are now the charity solicitation sections of the Los Angeles Municipal Code (Secs. 44.01 to 44.19, incl.) are in fact a codification of Ordinance No. 69,289 (New Series) approved April 4, 1931, together with amendments made since codification. Such ordinance repealed Ordinance No. 34,983 (N. S.) approved November 1, 1916 (not long after the decision in *Ex parte Dart,* 172 Cal. 47). Ordinance No. 34,983 is printed in the appendix hereto as Exhibit "A" [Appendix p. 1]. Ordinance No. 69,289, as amended, was carried into the code as Article 4 (Charities and Relief) of Chapter 4 (Public Welfare) of the Los Angeles Municipal Code at the time of the codification of the ordinances of the city in 1936, by Ordinance No. 77,000.

The section regulating and licensing pawnbrokers, secondhand dealers and collectors was originally Ordinance No. 31,623 (N. S.), approved January 15, 1915, and, as amended, was carried into the Los Angeles Municipal Code, in 1936, as Section 24.01, being one of the sections comprising Article 4 (Auctioneers, Second Hand Dealers, Pawnshops) of Chapter 2 (Licenses, Permits, Business Regulations).

The charity solicitation provisions are administered by the Social Service Commission of the city, while the

provisions of Chapter 4 of Article 2, which include Section 24.01, are administered by the Police Commission of the city.

Thus it appears that the provisions regulating charitable solicitations and those regulating secondhand and junk dealers and junk collectors, originated at different times, were adopted by different ordinances and are administered by different departments of the city government. They have no relation to each other, except that in the codification of existing ordinances in 1936 both were incorporated in the Los Angeles Municipal Code by Ordinance No. 77,000.

Generally speaking, each chapter of the code contains ordinances *administered* by a different department of the city government, although the police force *enforces* all penal provisions of such code as well as penal provisions of the state laws.

SUMMARY OF ARGUMENT.

POINT I.

THE RECORD DISCLOSES NO RIGHT OF APPELLANT TO RAISE THE FEDERAL QUESTION OF INFRINGEMENT OF RELIGIOUS LIBERTY.

A. A CORPORATION MAY NOT COMPLAIN OF INFRINGEMENT OF RELIGIOUS LIBERTY.

B. THE APPELLANT MAY CHALLENGE ONLY SUCH PORTIONS OF THE CITY ORDINANCE AS ARE BEING APPLIED TO IT.

C. THE DART CASE IS NOT DETERMINATIVE OF THE ISSUES IN THIS CASE.

POINT II.

THE CITY OF LOS ANGELES HAS JURISDICTION TO ADOPT REASONABLE REGULATIONS UPON THE SOLICITATION OF MONEY OR PROPERTY FOR CHARITABLE PURPOSES.

A. THE EXTENT OF THE POLICE POWER WITH RESPECT TO CHARITABLE SOLICITATIONS.

B. THE STATE MAY EXERCISE REASONABLE CONTROL OVER THE SOLICITATIONS OF FUNDS BY RELIGIOUS ORGANIZATIONS.

C. THE CHARITY SOLICITATION ORDINANCE IS NOT VOID BECAUSE OF UNREASONABLENESS.

POINT III.

THE PROVISIONS OF THE CITY ORDINANCE REGULATING SECONDHAND AND JUNK DEALERS AND JUNK COLLECTORS CONSTITUTE A VALID EXERCISE OF THE POLICE POWER.

POINT IV.

THE REVENUE TAX LICENSE PROVISIONS OF THE LOS ANGELES MUNICIPAL CODE ARE NOT INVALID.

ARGUMENT.

POINT I.

The Record Discloses No Right of Appellant to Raise the Federal Question of Infringement of Religious Liberty.

A.

A Corporation May Not Complain of Infringement of Religious Liberty.

The appellant is a corporation. There is no evidence that the religious freedom of a single member of the corporation or of its employees has been curtailed. Whether considered employees or members of the organization, its solicitors of funds for religious purposes have not been interfered with, and its lone minister, Mr. Perigo, has been allowed to solicit funds with which to sustain his needs while he ministers to the work of the Lord without remuneration of any kind from the corporation [Tr. p. 50, fol. 79].

> "Natural persons, and they alone, are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures for 'citizens of the United States.' Only the individual respondents may, therefore, maintain this suit."
>
> *Hague v. C.I.O.*, 307 U. S. 496, 514;
>
> See also, *Western Turf Assn. v. Greenberg*, 204 U. S. 359, 363.

An artificial creature of the law can have no religious belief, and no practice indulged in by such an institution can truthfully be said to be the religious practice of the institution.

It follows that the only issue which can be raised here is the business or commercial rights of the corporation, and no question of infringement of religious activity is involved. However, the California Supreme Court discussed the ordinance as though there were a party plaintiff entitled to raise the issue of religious freedom. For that reason we disregard the fact that none of the appellant's members, employees or agents are parties to the action, and discuss fully the validity of the charity provisions of the ordinance as if an attempt or threat had been made to apply the provisions thereof to the appellant or its employees.

B.

The Appellant May Challenge Only Such Portions of the City Ordinance as Are Being Applied to It.

The record does not disclose that solicitors of the appellant who solicit for money have been or will be required to subject themselves to the provisions of the ordinances of the City of Los Angeles named in the complaint. In fact, the testimony of the defendants, which is undenied by plaintiff, plainly discloses that there was no disagreement with respect to such solicitors, and that the sole bone of contention has been in regard to the operation of the industrial department of appellant corporation [Tr. p. 65, fols. 102-103; p. 67, fol. 106].

It follows that the ordinances named, insofar as they pertain solely to solicitation for charitable purposes by solicitors of the appellant, other than those employed or used by the industrial department, are not involved in the present case.

The record fails to show that any person requested the appellant to secure a secondhand dealer's license or a junk dealer's license from the Police Commission, or threatened to enforce such provisions of law against the appellant. Nor is there any record that any organization engaged in charitable or religious work was ever asked to secure such license. It appears from the record that the appellant filed an application to be relieved from payment of a revenue license tax and that such application was referred to the Social Service Commission for its recommendations [Tr. p. 72, fol. 113, to p. 73, fol. 116]. Provisions of the revenue sections of the Los Angeles Municipal Code, pertinent hereto, are printed as Exhibit "B" in appendix hereto [Appendix p. 5]. The provisions covering licensing of secondhand dealers, etc. (Sec. 24.01) and charitable solicitations (Secs. 44.01 to 44.19) are printed in appellant's brief and no need for printing them in full herein appears.

A litigant can be heard to question a statute's validity only when and insofar as it is being applied to his disadvantage.

Utah Power & Light Co. v. Pfost, 286 U. S. 165, 186.

The constitutionality of a statute is not to be drawn into question except in connection with its application to some person.

White v. Johnson, 282 U. S. 367, 373.

Constitutional questions are not dealt with abstractly.

Bandini Petroleum Co. v. Superior Court, 284 U. S. 8, 22.

See also:

People's Banking Co. v. Sterling, 300 U. S. 175, 184;

Premier-Pabst Sales Co. v. Grosscup, 298 U. S. 226, 227.

Thus we discover that the only question involved here is the right of the city to demand that, if the appellant wishes to solicit personal property as a gift and sell the same, or distribute portions of such property as charity and sell the balance in the open market, it must comply with certain provisions of the charities solicitation provisions of the Municipal Code, and also pay an occupation tax for the conduct of the business of selling personal property unless relieved of such tax in the manner provided by law.

C.

The Dart Case Is Not Determinative of the Issues in This Case.

Appellant quotes at length from the opinion written by Mr. Justice Hinshaw in *Ex parte Dart*, 172 Cal. 47, and would have the court consider the portions quoted as being the law of the case. The *Dart* case is not involved in the case before this court. Whether the decision of the State Court upon the present ordinance be considered as a reversal of the former opinion of such court, or as decision upon questions not involved in the *Dart* case, it is apparent that the only question involved here is the correctness of the decision of the State Court upon the ordinance now existing.

For this reason we do not discuss appellant's remarks in his brief or in his statement of jurisdiction concern-

ing the *Dart* case. However, for such comparison as the court may deem advisable, we print the ordinance involved in the *Dart* case in our appendix hereto [Appendix p. 9, Exhibit "C"], and also the order of the Municipal Charities Commission of the city and the resolution out of the attempted enforcement of which gave rise to the *Dart* case [Appendix p. 12, Exhibit "D"].

POINT II.

The City of Los Angeles Has Jurisdiction to Adopt Reasonable Regulations Upon the Solicitation of Money or Property for Charitable Purposes.

A.

The Extent of the Police Power With Respect to Charitable Solicitations.

The matter of regulation of solicitation of donations, funds or property for use in charitable enterprises comes under the police power of the state, and in California the police power of municipalities is co-extensive with that of the state, subject only to two limitations not pertinent to this case. (California Constitution, Art. XI, Sec. 11. See also, California Constitution, Art XI, Secs. 6 and 8.)

Property of citizens and all rights possessed by them are held or exercised subject to a reasonable exercise of the police power.

Nebbia v. New York, 291 U. S. 502, 523;

Chaplinsky v. New Hampshire, 315 U. S. 568, 571;

Virginian Ry. Co. v. System Federation No. 40, etc., 300 U. S. 515, 558.

The Fourteenth Amendment does not prohibit the proper exercise of the police power of the state.

Barbier v. Connolly, 113 U. S. 27;
Mugler v. Kansas, 123 U. S. 623;
Jones v. Brim, 165 U. S. 180, 182.

We do not understand the appellant to urge that the city has no power to regulate the solicitation of charity by a secular organization such as, for instance, an organization for the relief of the blind, or for the amelioration of the conditions of wounded veterans. We understand its contention to be that, if such solicitation is made by a religious organization, one of whose tenets of belief is that it is a part of their duty to minister to the physical needs of the halt, the blind, and the poor, those ministrations are such part of the practice of religion as to prevent any regulation upon the method of solicitation of funds with which to carry on such work. If the solicitation of funds for use in charitable purposes be a matter beyond the reach of the police power, it would appear to follow that the administration of funds so secured is likewise beyond the police power, and that activities supported by such funds are in the same situation.

We think no one would urge that, in spite of ordinances prohibiting such acts a charitable organization, religious or otherwise, supplying free meals to the hungry, may use spoiled food for such purpose, or, if supplying clothing to the needy, may supply them with cast-off garments in which the germs of a communicable disease might lie.

If administration of charity be not subject to the exercise of the police power, the homes maintained for the indigent, the hotels maintained by the Salvation Army and other religious organizations for the benefit of the underprivileged classes of society, as well as the many hospitals and other charitable institutions, would not be subject to such laws.

It appears to be well established under the laws of England, at least from the statutes of 43 Elizabeth, that the state has power of supervision over charities.

Trustees Philadelphia Baptist Assn. v. Hart's Executors, 4 Whar. 1;

Vidal, et al. v. Girard's Executors, 2 Howard 127.

It appears that the matter of regulation of charities comes within the ambit of the constitutional provision that regulations of a given character must apply equally upon all persons similarly situated. If this be true, an ordinance which prescribed rules for the conduct of solicitation of funds by a secular charitable organization such as the Boy Scouts, or the Society for the Prevention of Cruelty to Animals, neither of which makes claim to being a church or religious organization, but exempted from such regulation similar solicitations by the Methodist or Baptist Church for support of the same kind of charity purposes, would constitute unlawful discrimination against the societies subjected to the provisions of the ordinance.

This court in *Cantwell v. Connecticut*, 310 U. S. 296, at pages 303, 304, again affirmed the principles expressed in *Davis v. Beason*, 133 U. S. 333, and *Reynolds v. U. S.*, 98 U. S. 145, that, although the right to believe, preach and teach one's religious belief is absolute, statutes may circumscribe the practice of such belief. We think it now well settled that in this country everyone has a right, protected by our Constitution, to entertain and publicly preach any religious belief. To say that believers in any religion have a right to engage in practices thereof which tend to jeopardize the welfare of a community would be to go much farther than this court has gone heretofore. Although there is nothing in the record to show malversation by appellant, such fact does not argue that other persons have not so acted and may not so act in the future unless suitable supervision and regulation of their acts be provided.

This court may not close its eyes to facts which are of common knowledge.

United States v. Butler, 297 U. S. 1, 61.

It is a matter of common knowledge that persons often solicit funds upon the false representation that such funds are to be used for a certain charity and thereafter appropriate them to their own use. Appellant urges that the people of the State of California have it in their power to prosecute such persons for theft. Criminal prosecution does not recover for victims of fraud the losses they suffer, and the state is not rendered powerless to prevent fraud by reason of the fact that the perpetrator of a fraud may be criminally punished for his actions.

B.

The State May Exercise Reasonable Control Over the Solicitations of Funds by Religious Organizations.

Although there may be no restrictions upon the right to embrace, teach and preach the religion of one's choice, the practice thereof may be circumscribed under the police power.

Cantwell v. Connecticut, supra, 310 U. S. 296.

A reasonable system of registration of persons engaged in solicitation of funds for use of religious organizations does not impinge upon the guaranties of religious freedom in the Federal Constitution.

Cantwell v. Connecticut, supra, 310 U. S. 296;

Murdock v. Pennsylvania, 319 U. S. 105, 116;

Martin v. Struthers (concurring opinion Mr. Justice Murphy), 319 U. S. 141, 151.

So far as our research can determine, this court has not defined or limited the extent or class of permissible registration except to the extent it has done so in *Thomas v. Collins*, 323 U. S. 516, which case did not involve the solicitation of funds (*id.*, page 533). The court at page 540 said:

> "Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed."

The only limits which the court in that case imposed was that such system of registration or identification be such as does not intrude upon the rights of free speech and free assembly.

Mr. Justice Jackson, concurring (*id.*, p. 545) said:

> "The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system."

While in the cited case the court was discussing only the rights of free speech and public assembly, no reason appears why the language and reasoning in such case does not apply to charitable and religious organizations and their activities.

That such organizations are subject to reasonable police regulations which do not interfere with the right of the members to teach and preach their religious beliefs, is now well settled.

Cox v. New Hampshire, 312 U. S. 569;

Chaplinsky v. New Hampshire, 315 U. S. 568;

Prince v. Massachusetts, 321 U. S. 158.

The ordinance here involved not only does not interfere with the right to teach and preach one's religion, but it places no restrictions upon solicitation of funds

to be devoted to such purpose. The ordinance, insofar as religious organizations may be concerned, is well within the limits of the police power as defined by this court.

C.

The Charity Solicitation Ordinance Is Not Void Because of Unreasonableness.

Although it is well established that the validity of legislative acts is presumed, we have seen fit, without in any manner abandoning the benefit of such presumption, to submit our case as though the burden were upon us, rather than confining our efforts to refutation of the argument of the appellant. The same is true of our analysis of the ordinance and comments thereon.

It would seem unnecessary to discuss Section 44.04 [Appellant's Brief, Appendix p. 5] which prohibits perpetration of fraud; Section 44.07 [Appellant's Brief, Appendix p. 8] which prohibits use of false or fictitious names; Section 44.10 [Appellant's Brief, Appendix p. 9], prohibiting the use of the name of an association without the consent of at least two officers of the association, or Section 44.11 [Appellant's Brief, Appendix p. 9], which is essentially the same as Section 44.10. Each of such sections is designed to prevent fraudulent solicitation.

In the following discussion of the sections of the ordinance we cite the page in the appendix to appellant's brief where the text of the section is printed, instead of setting it out in full in our brief or reprinting it in an appendix thereto.

(1) *Section 44.02* [Appellant's Brief, Appendix p. 3].

This section, which enumerates powers of the commission, is divided into six subsections.

Subsection (a) provides for publication of the results of an investigation made under the provisions of Section 44.03. We submit that a city which contributes in excess of twenty-five million dollars per year to charity is entitled to full information concerning the various charitable enterprises which seek the largess of its citizens. The same is true as to subsection (b). Any charity which cannot stand the light of honest publicity is not worthy of public support.

With respect to subsection (c) we ask, who would say that allowing the commission to waive certain provisions of the ordinance in the event of a great calamity, such as the San Francisco earthquake and fire, constitutes an illegal delegation of power or is apt to result in discrimination?

Subsection (d) permits the recall of information cards upon the completion of solicitation or expiration of the period for which valid. This is a reasonable provision for the prevention of such cards falling into the hands of those who might make a fraudulent use thereof.

Subsection (e) provides for the recall of cards for additional information. If the public is entitled to information it is entitled to correct information, and certainly it is reasonable to require that the cards be returned promptly rather than that a card which contains incorrect or insufficient information should be used to mislead the public until such time as the holder thereof

thought he could no longer profit by the use thereof. The records of the Social Service Department of the city show that cards are recalled for correction in less than one per cent of the cases.

Subsection (f) was inserted to take care of situations, such as a community chest drive, which are always preceded by much publicity through newspapers, posters, radio announcements, etc., and in which all solicitors used are volunteer workers usually recruited from or through the various agencies or institutions (152 in 1946) which will benefit from the funds subscribed.

(2) *Section 44.03* [Appellant's Brief, Appendix p. 4].

This section sets out the powers of the department. The distinction between the commission and the department is that the commission is the governing board of the Department of Social Service. This section, like Section 44.02, is divided into various subsections; subsection (a) is correlated with subsections (a) and (b) of Section 44.02, and what has been heretofore said with respect to those provisions applies with equal force here.

Subsection (b) authorizes the department to examine books, records and papers of persons on whose behalf solicitations are made. No doubt if this provision were removed from its context and interpreted literally so as to permit the examination of all private papers of a person who files notice of intention to solicit for charitable purposes, it could be said to be too broad. However, the State Supreme Court has not placed such a distorted interpretation upon it. The provision must be con-

sidered and interpreted to carry out the intent of the legislative body of the city.

It is the duty of courts to use a construction, if possible, which will render a provision effective rather than void.

National Labor R. Board v. Jones & Laughlin, etc., 301 U. S. 1, 30;

U. S. v. Shreveport G. & E. Co., 287 U. S. 77, 82.

The provision, properly interpreted, means that the department may examine books, papers and accounts tending to give information concerning a proposed enterprise, which information will enable persons approached for donations to determine whether, in their opinion, the charity is one to which they wish to contribute. Appellant's interpretation (Appellant's Brief, p. 62) that it authorizes the examination of the books and papers of the distressed, appears to be a strained construction of the section, although we can see no constitutional objection to an investigation of the needs of those, and especially of organizations, asking the public to subscribe funds for their upkeep and maintenance.

Subsection (c) authorizes an investigation of the method of solicitation. Such investigation is surely not uncalled for in instances where false statements, etc., are reportedly made in efforts to secure donations. Investigation is often a necessary condition precedent to enforcement of Section 44.04.

Subsection (d) provides for the issuance of information cards, and outlines the contents of such cards. It authorizes the board to endorse a solicitation as provided by Ordinance No. 34,982 [Exhibit "E," Appendix p. 13], or to withhold endorsement. We see no constitutional objection to a department of a city, devoted to considera-

tion of charitable needs, endorsing a worthy cause. The power of the board to endorse is closely limited [Ordinance No. 34,982, Exhibit "E," Appendix p. 13].

To say that a fee of one dollar for the first twenty-five cards (4 cents each for less number) and one dollar per hundred cards thereafter (1 cent each for cards fewer than one hundred) is exorbitant, or an attempt to raise revenue, is to disregard facts with respect to costs of operation of the department.

(3) *Section 44.05* [Appellant's Brief, Appendix p. 5].

This section requires as a condition precedent to engaging in solicitation that the person or organization proposing to solicit file a notice of intention so to do, and it outlines the facts required to be stated therein. Appellant fails to point to any provision which unfairly burdens one who wishes to solicit. Because the appellant specifies no particulars wherein the section fails to meet the standards of constitutionality, it suffices to say that if it be correct that the state owes a duty to those who are to supply the funds, no better means can be found than to furnish the information called for by Subsections (a), (b), (c), (d), (e) and (f) of Section 44.05.

With respect to Subsection (g), it appears plain that information concerning the persons who in effect sponsor a charity is not only of assistance to prospective donors, but of value to the department in determining the extent to which an investigation should be conducted. Subsections (h) and (i) appear to call for no comment.

There is no information required by such Section 44.05 which an honest man could conscientiously refuse to divulge.

With respect to the complaint that the requirements of the section are complicated, suffice it to say that the fact that for thirty years persons and organizations, over one thousand in 1945, have succeeded in furnishing such information and that this case is the first known challenge to such provision, answers this objection to the section.

Appellant insists [Brief, pp. 56-57] that the requirement that a notice of intention be filed ten days before commencement of solicitation would prevent an itinerant preacher from carrying on his work. The baselessness of appellant's claim is readily apparent when we examine Section 44.16 and find that, because of the exception contained therein, an itinerant preacher may come into the city of Los Angeles and immediately proceed to solicit funds for evangelical, missionary or religious purposes.

(4) *Section 44.06* [Appellant's Brief, Appendix p. 7].

The substance of this section is the requirement that agreements with solicitors must be filed. If solicitors are to secure 90 cents out of each dollar he collects, certainly donors should know it.

With respect to the provision that the department may demand additional information within 48 hours, we note that no reasons have been advanced why, if some applicant intentionally or unintentionally suppresses information needed for the public, the department should not be allowed to secure such information. Likewise it is reasonable that the council fix ten days within which information should be furnished, provided it arranged, as it did, for additional time in the event additional time were necessary. One reason for the ten-day provision

is to enable the department to call for additional information during such period, and, upon securing it, issue cards in time to avoid interfering with plans of prospective petitioners.

(5) *Section 44.08* [Appellant's Brief, Appendix p. 8].

With respect to this section we again point out that if the state owes the duty of protection to the public, the requirement that those who are the recipients of its generosity should properly account for the trust which they purport to administer, is not unreasonable or onerous, inasmuch as any system of accounting meets the requirement of the ordinance if it furnishes information which reasonably tends to enlighten donors and prospective donors of the aims and attainments of the organization and the use to which gifts are put.

(6) *Section 44.09* [Appellant's Brief, Appendix p. 8].

Subsection (a) of this section prohibits solicitation of charitable donations by means of boxes and receptacles in public places, without the written permission of the board. It will be seen from examination of the preceding sections that the board is not empowered to deny to anyone filing a notice of intention to solicit the right to conduct solicitation. Neither the commission nor the department has power to prohibit solicitation upon compliance with the conditions precedent prescribed by the ordinance. The Supreme Court of California has interpreted the ordinance as providing that the department must issue cards upon completion of the filing of a notice

containing the information necessary to enable it to prepare cards [Tr. p. 85, fol. 136].

This distinguishes the ordinance in the case at bar from the ordinances heretofore considered by this court which have been of the type involved in the *Dart* case. All of them have to a very considerable extent been ordinances which permitted city officials to arbitrarily deny permits.

Cantwell v. Connecticut, supra, 310 U. S. 296;
Jamison v. Texas, 318 U. S. 413;
Largent v. Texas, 318 U. S. 418.

The only limitation contained in this section is the use of boxes or receptacles in the solicitation of funds. This court can take judicial notice of the fact that the common method of mendicants in securing funds is by means of cups or other receptacles passed among pedestrians. Because of this fact we feel the city could absolutely prohibit solicitation by such method upon the streets in order to prohibit common begging. It is certainly within the police power of the municipality to prohibit begging on the street.

A state, in order to effectuate a policy within its power, may prohibit acts which are in themselves innocuous.

Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192.

The fact that the commission is given power to waive this provision does not render the section invalid in the absence of a showing of discrimination.

Subsection (b) was added to the ordinance to prevent the practice of placing cans, milk bottles, etc., in stores and other places for the purpose of securing donations, the use of which for charitable purposes could not be traced. The provision was added to prevent fraudulent solicitation for alleged charitable purposes. This section, like all others under discussion, does not prevent solicitation by the methods therein named for religious, evangelical or missionary purposes [Sec. 44.16], nor do the provisions of subsection (b) apply to persons who have qualified to solicit for charitable purposes by filing notice of intention.

(7) *Section 44.12* [Appellant's Brief, Appendix p. 10].

We think no one will seriously argue that a person from whom a donation is sought has no right to have information concerning the prospective donee and the use to which his gift will be put. The sole question presented is whether this section constitutes a proper method of imparting such information. There is no requirement that the prospective donor read the card. If upon presentation thereof, he concludes to donate without so reading, the solicitor may accept the donation. The section does not require that the solicitor refuse a donation unless the donor read the card. The only requirement is that the prospective donor be given a reasonable opportunity to read the card.

(8) *Section 44.13* [Appellant's Brief, Appendix p. 10].

This section, like the preceding one, is for the purpose of effectuating the reasonable requirement that donors be afforded information concerning the prospective donee and the use to which contributions are to be put. The object, of course, is to prevent highly exaggerated and fanciful statements which tend to mislead public-spirited persons who might be influenced thereby. The net effect of the section is that, irrespective of how fanciful may be the publication, the information contained upon the information card must be therein.

The provision in this section with respect to solicitation by telephone is probably of no practical effect by reason of the provision of Section 44.18, added in 1939, which we discuss hereafter.

(9) *Section 44.14* [Appellant's Brief, Appendix p. 10].

This section requires that a report of a solicitation campaign be filed. Like so many of appellant's objections to provisions of the ordinance, the objection to this section is very general, and is substantially a conclusion of the appellant. In the absence of more particularization of objections by appellant, we submit that the fact that for many years such reports have been made without any known contest of the right of the commission to demand such report (except the present case) supports the assumption that the required report does not present an onerous burden to persons engaged in soliciting funds and distributing them in charitable activities. Certainly, he who donates is entitled to be informed as to the use made of his gift.

(10) *Section 44.15* [Appellant's Brief, Appendix p. 11].

This section requires that solicitors *tender* to each donor a written receipt; such receipt, in addition to a statement of the amount or kind of donation, must contain certain other information. The information required can be printed in advance upon the receipt form. If the solicitor is soliciting for donation for general use and also for a specific use (see paragraph (b) of section), a blank for insertion of such information can be left on the form. No receipt is required for donations of sums of less than one dollar.

(11) *Section 44.16* [Appellant's Brief, Appendix p. 12].

This section sets out various solicitations which are not subject to the provisions of the ordinance. No provision of this section appears to be questioned other than the provision which excepts solicitations "made solely for evangelical, missionary or religious purposes." There is no claim on the part of appellees that the language quoted is to be construed as requiring that each dollar contributed to persons soliciting for religious purposes be used in teaching or preaching the gospel. This section, as all others in the ordinance, must be reasonably interpreted. Sums for the support of ministers, provision for places to hold services and other expenses reasonably tending to promote promulgation of religious beliefs, must be deemed to be within the scope of the exception. Neither do we insist that the fact that, as an incident to the promotion of a religious work, some physical aid

is given to the needy of the church or to individuals in the community, changes the nature of the solicitation. Where the facts are such that a reasonable person could conclude that the funds solicited are for the primary purpose of promotion of charitable enterprises, or the solicitation is in fact conducted as a blind behind which to carry on other activities, the proper court may so determine. Certainly any religious organization which carries on an endeavor, as a hospital, rest home, etc., separate and apart from its religious activities, should be subject to reasonable regulation. Any organization which hides behind a purported charitable purpose for personal gain is not entitled to protection by the courts.

No employee, officer or board of the city is empowered to determine whether the acts of any person are or are not within the exception. Any one who believes his activity to come within the exception may continue his activity subject only to the possibility that a jury may conclude that he is in error. Neither the commission nor the department prosecutes persons for soliciting in violation of the ordinance. They can only request that prosecutions be instituted in the proper court. They may advise individuals that in their opinion certain acts are unlawful, just as a health officer may tell a cafe owner that his acts are unlawful, or other administrative officer may advise a person that in the opinion of such officer the person is acting unlawfully. Prosecution may not be had unless from facts laid before the city attorney, the official charged with prosecution of violations of penal offenses created by ordinance, he determines that a violation has occurred, or such information be laid before a magistrate and he orders a criminal complaint filed.

If it be argued that, as so construed, the ordinance is not sufficiently definite, such argument is answered in the words of Mr. Justice Holmes:

> "But, apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."
>
> *Nash v. U. S.*, 229 U. S. 373, 377.

See also:

Miller v. Strahl, 239 U. S. 426, 434.

No legislative body could draw a blueprint which would define with exactness what constitutes "solely religious" endeavors. Likewise no legislative body could catalogue all the activities coming within the broad field of social service as distinguished from religion and its promulgation. This court has plainly stated that some form of regulation of solicitation by religious organizations is permissible. It is too well known to be seriously disputed that the public is not infrequently the victim of psuedo religious activities carried on for the purpose of enhancing the financial condition of the promoter of such activities.

Irrespective of the utterances of this court which would justify a procedure requiring solicitors for religious organizations to register and which procedure, if it is to be of benefit to the public, would require giving the name of the organization to which solicitors belong, to-

gether with some statement of the contemplated religious activity and information concerning the amount of money solicited and the use made thereof, the city has seen fit to follow the plan which for more than 30 years has enabled churches and religious organizations to thrive, and which at the same time has enabled it to so supervise charitable activities as to promote public faith in the organizations soliciting under its system of regulation. In 1945 over twenty-five million dollars were given to charity, and during the first nine months of 1946, over thirty million dollars were so given, to say nothing of vast sums not reported to the commission which have been given to build church edifices and support their activities. It is only fair to state that donations for charitable purposes have materially increased since the war.

It is inconceivable that the citizens of Los Angeles should be faced with a situation whereby any person, however corrupt and unprincipled, might come into the city and, without supervision and without furnishing any report of his stewardship, ply his nefarious activities unhindered. Such condition would not only result in the channeling of money needed for the support of the needy, the curing of the sick and the healing of the lame, to ulterior uses, but would result in such reaction upon the public through loss of confidence in purported charitable enterprises that some of our most worthy institutions would starve by reason of the fact that gifts, the life-blood of charity, would be denied them.

The foregoing analysis embraces what might be called the original ordinance, enacted for the purpose of effectuating valid regulations in conformity with the holding of the Supreme Court of California in the *Dart* case. That

some changes and additions have been made during the years to meet conditions which experience found to be detrimental, can be seen by comparing the first sixteen sections of the present ordinance with the ordinance enacted in 1916, printed in the appendix hereto as Exhibit "A" [Appendix p. 1]. In the following we discuss the subsequent sections of the chapter governing charitable solicitations.

(12) *Section 44.17* [Appellant's Brief, Appendix p. 13].

This section was added to take care of the traffic difficulties arising by reason of the use of vehicles for solicitation in that portion of the city having serious traffic congestion.

(13) *Section 44.18* [Appellant' Brief, Appendix p. 13].

This section was added in an attempt to stop what is colloquially known as "boiler room solicitation," in which some person would install telephones in a room and use a battery of high-pressure solicitors to solicit by telephone for alleged and often fictitious charitable enterprises, frequently sending messenger boys in the employ of reputable messenger service companies to pick up the donations, which were thereafter converted to the use of the individual conducting the solicitation.

(14) *Section 44.19* [Appellant's Brief, Appendix p. 13].

This section was added in 1939 by reason of the fact that during the course of years persons from time to time have come to the city and entered into contracts

to secure funds for worthy charities either by solicitation or by promotion of some kind, such as an entertainment to which tickets were sold the public at high prices on the representation that the proceeds were to go to charity. It often developed that the charity received only an insignificant share of the net proceeds, and in some instances the expenses were so padded that the charity received nothing but the criticism of that portion of the public which ascertained the facts.

It is conceded that a literal interpretation of the definition of "promoter" [Sec. 44.01, Appellant's Brief, Appendix p. 1] would result in the section applying to any one who receives any part of funds solicited. As so construed it would render the provisions of Section 44.06 [Appellant's Brief, Appendix p. 7] meaningless. A construction which would render a portion of a statute invalid is to be avoided if any other reasonable construction is possible. It is apparent that the section intends to cover the acts of members or employees of charitable organizations or other persons who engage in promotional activities as independent contractors, and in such capacity agree to secure funds for charitable purposes. Such persons are engaged in a business. The business of raising money for such purposes is subject to a reasonable exercise of the police power.

The provision of the section [Subsection (q), Appellant's Brief, Appendix p. 18] that solicitors employed by promoters shall make bond in the sum of $500.00 and that the board collect a fee of one dollar, plainly shows that the section was not intended to cover solicitations by persons working under the direct supervision and control of charitable organizations conducting their own fund-

raising campaigns. The requirement that one who, as an independent contractor, agrees to collect and account for the funds of another must give a bond for the protection of his employer, and that agents of such contractor likewise furnish security, certainly violates no provision of the Constitution. If, as Mr. Justice Jackson said in his concurring opinion in *Thomas v. Collins, supra,* the state owes a duty to those who supply funds to promote an enterprise, we know of no better plan of protection against embezzlement by promoters and their agents than that of requiring a bond.

In concluding our analysis of the charity solicitation ordinance, we point out that the person who solicits and receives money for charitable purposes is not engaged in the acquisition of property for his own benefit. The money he receives is given him in trust, to be used for the benefit of the public. We know of no higher voluntary trust, and it is only proper that the municipality establish regulations to insure as far as possible that the public will not be defrauded by unworthy and fraudulent solicitors and that the trust fund thus established will not be dissipated.

Argument that regulation of solicitation of such funds constitutes a deprivation of the right to acquire and own property is to urge a strained construction of the provisions of the Constitution. The decisions of your honorable court clearly hold that a municipality may require compliance with a reasonable registration ordinance (*Cantwell v. Connecticut,* 310 U. S. 296) in order that the municipality may investigate "strangers" coming into the community (*Murdock v. Pennsylvania,* 319 U. S. 105).

The right to investigate connotes a right to protect the public against fraud and misrepresentation and even to prohibit solicitation by known embezzlers, as a "* * * restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." (*West Virginia State Board v. Barnette*, 319 U. S. 624, 639.)

Protection against fraud and maladministration of trust funds is within the power of the state. Certainly the decisions of this and other courts bring fraudulent solicitation and embezzlement within the "Clear and Present Danger" doctrine, however circumscribed the outer limits of such doctrine may be.

The record shows that the only members of the appellant corporation are the "workers" [Tr. p. 48, fol. 76], and we are not informed as to what such term implies. From all that appears in the record we may assume that the directors, successors to the original incorporators, constitute the entire membership.

Although there is nothing to show that the directors of appellant corporation have done so, it is readily apparent that any corporation of this character could limit its membership to the number of directors required by law, and could vote to such directors salaries sufficient to use all the income of the corporation, leaving none for charitable purposes. In other words, such a corporation could well be used as the means of accumulating property by the directors, thereby defeating the purpose for which the charter was granted. Such possibility weighs heavily when considering the right of the state to regulate organizations purported to be engaged in either charitable or religious activities.

POINT III.

The Provisions of the City Ordinance Regulating Secondhand and Junk Dealers and Junk Collectors Constitute a Valid Exercise of the Police Power.

Section 24.01 of the Los Angeles Municipal Code, which section regulates the licensing of pawnbrokers, secondhand dealers, junk dealers and collectors, is printed in the appendix of appellant's brief, page 19 thereof, for which reason it is not set out in full herein.

The appellees make no claim that the evidence in the record would sustain a conclusion that the appellant is "engaged in the business" of secondhand or junk dealer or junk collector, regulated by Section 24.01 of the Los Angeles Municipal Code, although the fact that in the sale of articles to the mills only ten per cent of the proceeds go to the appellant, might support a strong inference to that effect. We insist however, that when and if a corporation, whether incorporated as a charitable or religious organization, deals in secondhand goods or junk for the purpose of profit to the members thereof instead of the creation of a trust fund for expenditure in charitable or religious purposes, such corporation is subject to the provisions of the section. The fact that an organization is incorporated as a charitable or religious corporation is not proof, or at least not conclusive proof, that it is not a business corporation. (*White v. Central Dispensary, etc.*, 69 App. D. C. 122, 99 F. (2d) 355).

The only case involving the validity of laws applicable to secondhand and junk dealers decided by this court, so far as we find, is *Rosenthal v. People of the State of*

New York, 226 U. S. 260. That case did not directly involve licensing provisions. It appears from the opinion of Mr. Justice Pitney therein that New York had at that time a licensing plan similar to the city ordinance involved in this case [Sec. 24.01, Appellant's Brief, Appendix p. 19]. Concerning such regulations Mr. Justice Pitney said:

> "Counsel, indeed, concedes the abundant right of the legislature to regulate the junk business, and admits that such regulations as those just referred to are quite within the legislative power of the state. This concession is, we think, very properly made."

Appellant's objection to the decision of the State Supreme Court appears to be based upon the proposition that it is preposterous to suggest that thieves would undertake to dispose of their loot in places which sell only goods donated to it and give the proceeds to charity. Such an outlet for the sale of donated goods is not a firm engaged "in the business" of dealing in secondhand goods.

If devoting a portion of one's income to charitable or religious purposes constitutes grounds for disregarding the provisions of an ordinance valid as to persons who do not contribute to such activities, it is readily apparent that a corporation, owned or controlled by persons desiring to operate for private gain behind a screen of alleged charitable or religious purposes might, by giving or devoting one, five or ten per cent of its income to such purposes, avoid compliance with reasonable police regulations applicable to the business in which the corporation is engaged, and thereby secure to themselves

substantial business advantages not enjoyed by their competitors.

With respect to appellant's statement that the validity of the licensing provisions applicable to persons engaged in the secondhand business was involved in the *Dart* case, suffice it to say that such statement is not in any manner supported by the record in that case.

POINT IV.

The Revenue Tax License Provisions of the Los Angeles Municipal Code Are Not Invalid.

We print as Exhibit "B" in the appendix hereto, pertinent portions of the revenue tax ordinance of the City of Los Angeles [Appendix p. 5]. Section 21-10 [Appendix p. 5] is self-explanatory, in that it shows the licensing provisions apply only to those engaged in an activity as a business, and the California courts have so held (*Union Pacific R.R. Co. v. City of Los Angeles*, 53 Cal. App. (2d) 825, 830).

Section 21.201 [Appendix p. 6] provides that charitable organizations, etc., which deal in secondhand articles, are exempt from the tax if the business is not operated for private gain. It is plainly apparent that the intent of the legislature was to provide a method for exemption of charitable and religious organizations and at the same time prohibit persons engaging in such business for private gain from taking advantage of the exemption. We submit that this section does not come within *Murdock v. Pennsylvania*, 319 U. S. 105.

Section 21.201 cannot under any circumstances be considered as a tax upon the right to teach or advocate a

religious doctrine. Any possible effect it might have upon the teaching or preaching of a religious doctrine is quite remote.

With respect to appellant, it appears from the record that it operates four trucks, puts part of the collections in a store for sale at retail and sells the remainder at mills. Of the material sold to the mills only ten per cent of the proceeds is delivered to the corporation. Concerning what revenue, if any, the corporation receives by reason of the operation of the store we are not advised. Neither are we advised as to the reasonable value of the articles given in charity. We are advised that the corporation, through its solicitors, distributes some tracts, number and cost unknown, and three hundred New Testaments, cost unknown. We are further advised that the corporation gets seventy cents out of each dollar collected by money solicitors (except Mr. Perigo), but we are not advised as to the total money so received.

In short, there is no showing that, after expenses are paid, the remainder is not distributed to members of the corporation as salaries or otherwise. We submit, therefore, that the evidence is sufficient to support the inference that the organization is operated for private gain.

The right of a city to levy an occupation tax upon those who engage in business for private gain in the city is too well established to be open to argument. Whether a given secondhand or junk business is or is not operated for private gain is a question of fact which the city must decide in the first instance, but the final decision must be made by the courts in the event a person engaged in such activities feels that the authorities of the city have discriminated against him.

With respect to the fifty per cent rule used by the commission in determining whether exemption should be granted [Tr. p. 73, fol. 115], we submit that, although establishment of such figure might at first glance appear arbitrary, mature consideration of such provision fails to support that conclusion.

The public records of the Social Service Department of the city disclose that the average expense of solicitation in this city for charitable purposes in 1945 was nine and one-half per cent. Naturally the cost of operation of an industrial department would run somewhat higher. We are unable to segregate costs of such operation so as to give an exact figure. However, it appears that the cost of solicitation of all charitable funds by the Goodwill Industries, which operate the largest industrial department in the city, was twelve and one-half per cent of the total amount of their receipts.

It is our opinion that the selection of fifty per cent is so liberal as to avoid the charge of being arbitrary when applied to the revenue ordinance involved in the instant case in connection with the operation of an "industrial" plant, such as appellant conducted. Whether such rule would constitute a proper yardstick for measuring all applications for exemption we need not decide. If the administrative board errs in its decision the applicant may have such decision reviewed in the Superior Court (California Code of Civil Procedure, Sec. 1094.5), or he may proceed to operate without securing a revenue license, and in any criminal action arising out of his failure to secure such license, or in a civil action for the recovery of such tax, he may show in his defense that

he comes within the exception created by Section 21.201 [Appendix p. 6].

No person engaged in a "business," as such term is defined in the ordinance, has a constitutional right to be relieved from the payment of his fair share of the expenses of government merely because he concludes to devote some portion of the income from such business to charitable pursuits. It follows that unless the effect of the rule is to unfairly and arbitrarily discriminate against some, at the expense of or disadvantage to others, the application of the rule applying to the forgiving of certain debts or obligations due the city does not constitute a violation of our constitutional provisions.

We have herein cited cases holding that one may not complain of a law unless it is applied to his injury. No need to repeat such citations at this point appears. There is no evidence which would support an inference that the application of the rule has or will injure the appellant.

Conclusion.

It is too well settled to admit of argument that, in determining the validity of a legislative act of a state, this court will consider such statute as it has been interpreted by the highest court of the state. The Supreme Court of California has interpreted the ordinance involved as one which applies only to the solicitation of charitable contributions, and has found that the record shows the appellant to have been engaged in solicitation of property for use in charitable activities. We submit that as so interpreted the ordinance comes well within the limits of permissible regulation under the police power.

as such limits have been outlined in the various decisions of this court.

We also submit that the appellant may not raise the question of infringement of religious liberty. Irrespective of arguments covering the broad field of freedom of religion, it is manifest that the question to be decided is quite narrow. It is limited to determining the rights of a corporation to operate and maintain a so-called industrial department for the purpose of securing property for sale if and when the proceeds therefrom are devoted to charitable purposes.

The judgment of the Supreme Court of the State of California should be affirmed.

Respectfully submitted.

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Attorneys for Appellees, The City of Los Angeles, Board of Social Service Commissioners, Department of Social Service, and Dan O. Hoye, City Controller.

WILBUR BASSETT,
Of Counsel.

APPENDIX.

Exhibit "A."

SOLICITING OF ALMS.

Ordinance No. 34, 983 (New Series)
Approved November 1, 1916.

An Ordinance regulating the soliciting of alms and contributions for charitable purposes in the City of Los Angeles.

Section 1. It shall be unlawful for any person to make or perpetrate any intentional misstatement, deception or fraud in connection with the solicitation of alms, food, clothing, money or contributions within the City of Los Angeles for charitable or philanthropic purposes.

Sec. 2. It shall be unlawful for any person to solicit alms, food, clothing, money or contributions within the City of Los Angeles, in the name of, or on behalf of, any charitable corporation or association unless such person is authorized in writing by such corporation or association to make such solicitation, and unless a copy of such authorization has been previously filed with the Social Service Commission, and unless such person shall tender to each person donating alms, food, clothing, money or contributions a written or printed receipt signed by the solicitor which will contain in addition to a description of the amount and kind of the donation substantially the following matters:

(a) The name of the corporation or association upon whose behalf the solicitation is made.

(b) A statement as to whether the donation solicited is to be applied for the general purposes of the corporation

or association or for specific purposes, and if for specific purposes the nature thereof shall be clearly stated.

(c) A statement as to the amount, if any, or the proportionate part, if any, of the money donated that is to be used for charitable purposes outside of the City of Los Angeles. In the event that it is impracticable to state said amount of percentage, said receipt shall so declare.

(d) In the event that more than fifteen per cent. of the amount donated is payable in commission and expenses to the solicitor, said statement shall so declare.

Provided, however, that no receipt need be given or tendered if donation of money is made by placing of the same in a locked receptacle, in such manner that it is impracticable to ascertain either the amount donated or the name of the donor, and if a card or placard shall be conspicuously attached to such receptacle containing in legible writing or printing the statements required under subsections (a) to (d), both inclusive, of this section.

Provided, further, that no receipt need be given for any donation of money in an amount less than $1.00.

Sec. 3. It shall be unlawful for any person to solicit alms, food, clothing, money or contributions within the City of Los Angles for charitable, or purported charitable, purposes, unless within the fiscal year of the City of Los Angeles in which such solicitation is made there shall have been filed with the Social Service Commission by the corporation or association upon whose behalf the solicitation is made written notice of intention to solicit

money or property within the City of Los Angeles containing the statements required to be made in the written receipt in Section 2 hereof provided for. Said notice of intention shall be signed by two officers of the corporation or association upon whose behalf the solicitation is to be made and shall be open to the inspection of the public.

Sec. 3½. It shall be unlawful for any person, charitable or philanthropical institution to solicit funds for any purpose whatever by means of boxes or receptacles upon any streets or alleys within the City of Los Angeles, except by written permission of the Social Service Commission.

Sec. 4. On and after one year from the adoption of this ordinance it shall be unlawful for any person to solicit alms, food, clothing, money or contributions within the City of Los Angeles for charitable purposes or purporting to be for charitable purposes on behalf of any corporation or association unless such corporation or association is maintaining a system of accounting whereby all funds donated to it and all disbursements made by it are entered upon the books of its treasurer or other financial officer.

Sec. 5. The provisions of Sections 2 to 4, both inclusive, shall not be applicable to solicitation made upon premises owned or occupied by the corporation or association upon whose behalf such solicitation is made, nor to solicitation for the relief of specific individuals specified by name at the time of the solicitation where the solicitor represents in each case that the entire amount collected, without any deduction whatever, shall be turned over to

the named beneficiary or beneficiaries, nor shall they be applicable to any corporation or unincorporated association soliciting contributions solely from persons who are members thereof at the time of such solicitation, nor shall they be applicable to solicitations made solely for evangelical, missionary or religious purposes.

Sec. 6. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance. The Council hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional.

Sec. 7. That any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than one hundred dollars, or by imprisonment in the city jail for a period of not more than thirty days, or by both such fine and imprisonment.

Exhibit "B."

Sections of License Ordinance of the City of Los Angeles

Sec. 21.08. Definitions.

The following words and phrases whenever used in this Article shall be construed as defined in this section, unless from the context a different meaning is intended or unless a different meaning is specifically defined and more particularly directed to the use of such words or phrases.

(g) "Engaged in business" shall mean the conducting, managing or carrying on of any profession, trade, calling, occupation or commercial enterprise in the City licensed under the provisions of this Article as owner, officer, agent, manager, employee, servant or lessee of any of them.

Sec. 21.10. Permit Requirements.

No person shall engage in any business, profession, trade or occupation or perform any act, required to be licensed under the provisions of this Article until such license is first obtained; no license shall be issued hereunder when the provisions of some other Article of this Code or of any other ordinance of this city require a permit to be obtained or to be applied for as a prerequisite to entering into or performing any such business, trade occupation or act, until such permit is first so applied for or obtained as the case may be. Any license issued in violation of this section shall be void.

Sec. 21.100. (a) For every person engaged in the business of buying or selling, or otherwise dealing in used or secondhand rags or paper, or used or secondhand rags

and paper, at a fixed place of business in the City of Los Angeles, the sum of $100.00 per year, or fractional part thereof;

(b) For every person engaged in the business of buying or selling, or otherwise dealing in articles commonly known or referred to as junk, excepting only rags or paper, and including but not limited to old or second-hand sacks, cans, bottles or metals at a fixed place of business in the City of Los Angeles, the sum of $200 per year, or fractional part thereof; provided that a person licensed under the provisions of this subsection may deal in the commodities or materials mentioned in the preceding subsection without obtaining an additional license under the provisions of said preceding section.

Sec. 21.134. For every person engaged in the business of buying, selling or otherwise dealing in secondhand goods, wares or merchandise, the sum of $40.00 per year.

(Note.) This section contains a lengthy provision providing a conditional exception for machinery dealers whose business in secondhand machinery does not exceed 12½% of the total business. Such exception is not pertinent to the questions before this court and is not printed herein.

Sec. 21.201. (a) The provisions of this Article shall not be construed to require the payment of any license fee to operate or carry on the functions of any charitable or religious institution, organization or association organized for charitable or religious purposes and conducted solely for such purposes, nor the payment of any license

fee to engage in teaching, preaching or otherwise disseminating any religious tenets or beliefs of any religion, nor shall a license fee be required for the conducting or staging of any concert, exhibition, lecture or entertainment where the net receipts, if any, derived therefrom are to be used solely for charitable or benevolent purposes within the City of Los Angeles, and not for the purpose of private gain, nor shall any license fee be required to be paid by any religious, charitable, fraternal, educational, military, state, county or municipal organization or association for the conducting or staging of any entertainment, dance, concert, exhibition or lecture when the net receipts derived from any of the same are to be used wholly for the benefit of such organization and not for the purpose of private gain of any individual, or by any Credit Union Corporation organized under the provisions of Act 1887, Statutes of 1927, page 51, as amended, and actually operating for the purposes of and in the manner prescribed by said Act 1887.

(b) An independent contractor who for profit or gain undertakes to carry on any business or activity for the conduct or operation of which a license is required by any section of this Article, shall not be exempted from the payment of the fee established therefor because of the fact that he has paid or agreed to pay or turn over to any charitable institution or organization a portion of the receipts or profits of the business or activity, as a reward or recompense for the sponsorship of the business or activity, or for any other reason, and such a contractor

shall not be deemed to be acting for charitable purposes only.

(c) Any applicant for a license who claims exemption from the payment of the license fee, pursuant to the foregoing provisions of this section, shall make an application for such exemption upon a form furnished by the City Clerk. The application shall be forwarded to the Board of Social Service Commissioners which Board shall make or cause to be made such investigation of the applicant and the business or activity carried on or proposed to be carried on as may be necessary to determine whether or not such business or activity is in fact conducted for charitable purposes only and whether the proceeds thereof are to be used for the purposes mentioned in Subsection (a) hereof. The Board of Social Service Commissioners shall endorse its finding upon the application and return the same to the Clerk. If the finding aforesaid is to the effect that the business or activity is in fact carried on or proposed to be carried on for charitable purposes only, and that the proceeds thereof are to be used for the purposes mentioned in subsection (a) hereof, then the Clerk shall issue the license to the applicant without the payment of the license fee therefor, provided the applicant has complied with all other applicable provisions of this Code, and the license so issued shall show on its face that it was issued without fee and the reason therefor. If the finding be otherwise, the Clerk shall not issue the license unless the regular fee therefor be first paid, as in any other case.

Exhibit "C."

ORDINANCE No. 28,255
(New Series)

An Ordinance prohibiting begging in the public streets, or places, and regulating the soliciting of alms and contributions for charitable purposes in the City of Los Angeles.

The Mayor and Council of the City of Los Angeles do ordain as follows:

Section 1. It shall be unlawful for any person to beg, or practice begging; in or on any public street, or in any public place in the City of Los Angeles.

Sec. 2. It shall be unlawful for any person, firm, corporation or association to solicit alms, food, clothing, money or contributions within the City of Los Angeles, without first securing a permit so to do from the Municipal Charities Commission of said city. Provided, however, that the provisions of this section shall not apply to properly accredited solicitors of established churches of said city soliciting for purely religious purposes, but it shall apply to the various institutional works carried on by said churches in like manner as other persons, firms, corporations and associations. The permit from the Charities Commission above referred to shall consist of a written certificate issued by the said commission certifying that the object of said solicitation is worthy and meritorious, and authorizing the soliciting of gifts and donations therefor; said permits may be revoked by said Commission at any time.

Sec. 3. It shall be unlawful for any person to solicit or collect for any charitable or philanthropic organization,

without first obtaining a written permit so to do from the Municipal Charities Commission; said permit shall be revocable at any time in the discretion of said Commission, which may adopt such regulations regarding the soliciting and collecting of funds as its judgment may dictate, and it shall be obligatory upon the holders of such permits to abide by such rules and regulations.

Sec. 4. It shall be unlawful for any person, firm, corporation or association to give or promote any entertainment, fair, bazaar or benefit in the name of charity or philanthropy, without first obtaining a written permit so to do, from the Municipal Charities Commission, said permit to be revocable at any time at the discretion of said Commission.

Sec. 5. It shall be unlawful for any person, firm, corporation or association to solicit funds, within the City of Los Angeles, for any ethical, evangelistic, religious, missionary or charitable purposes without having first obtained an endorsement certificate from the Municipal Charities Commission. Provided, however, that the provisions of this section shall not apply to established and recognized churches or other religious organizations in the City of Los Angeles.

Sec. 6. It shall be unlawful for any person, firm, corporation or association to sell, or offer for sale, any clothing, household goods, or other goods, wares or merchandise which have been solicited or donated for charity or philanthropy without first obtaining a written permit so to do from the Municipal Charities Commission, said per-

mit to be revocable at any time at the discretion of said Commission.

Sec. 7. That any person, firm, corporation or association violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than one hundred ($100) dollars, or by imprisonment in the city jail for a period of not more than thirty (30) days, or by both such fine and imprisonment.

Sec. 8. That in order to properly regulate the soliciting of aid for charitable or philanthropic purposes and to prevent fraud and deception from being practiced by soliciting for such purposes, this ordinance is urgently required for the immediate preservation of the public peace, health and safety; and the City Clerk shall certify to its passage by a unanimous vote, and cause the same to be published once in The Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

I hereby certify that the foregoing ordinance was introduced at the meeting of the Council of the City of Los Angeles of August 15, 1913, and was passed at its meeting of September 13, 1913.

CHARLES L. WILDE,
City Clerk.

Approved this thirteenth day of September, 1913.

F. J. WHIFFEN,
Acting Mayor.

Exhibit "D."

RESOLUTION OF MUNICIPAL CHARITIES COMMISSION.

Whereas, by Section 3 of that certain Ordinance of the City of Los Angeles, No. 27,510 (New Series), entitled, An Ordinance Creating a Municipal Charities Commission, and prescribing its powers and duties;

The Municipal Charities Commission has power to endorse such charities dependent upon public appeal or general solicitation for support as meet actual needs of the community, attain a reasonable standard of efficiency and are so conducted as to insure the public of the wise use of funds; and

Whereas, a charity dependent upon public appeal or general solicitation for support can only insure the public of the wise use of funds, and meet the actual needs of this community, and attain a reasonable standard of efficiency by being under the control of our own citizens, and subject to local laws and regulations;

Therefore Be It Resolved, that as a condition precedent to an endorsement, the Municipal Charities Commission will require a strict compliance on the part of every applicant, with the following regulation; to-wit:

The title to all property, both real and personal, situate in the City of Los Angeles, wholly or in part acquired by any such charitable, philanthropic, or religious organization, firm or corporation, for eleemosynary, charitable, or philanthropic purposes through the donations of any kind or character by citizens of the City of Los Angeles, shall be vested in a corporation organized under the laws of California, a majority of whose directors or trustees shall be citizens and residents of the City of Los Angeles.

Exhibit "E."

ORDINANCE No. 34,982
(New Series)

An Ordinance creating a Social Service Commission and prescribing its powers and duties.

The Mayor and Council of the City of Los Angeles do ordain as follows:

Section 1. There is hereby created a Commission of the City of Los Angeles to be known and designated as the Social Service Commission. Said Commission shall consist of five members, not more than three of whom shall be of the same sex. They shall be appointed by the Mayor subject to confirmation by a majority of the Council. All of said Commissioners shall serve without compensation, and no person while serving as an officer or director of any corporation or association coming within the purview of this ordinance shall be eligible to serve as a member of said Commission. The terms of office of the members of said Commission shall be four years, provided however, that the terms of office of the five members of said Commission first appointed shall commence upon the date this ordinance becomes effective, and the members so appointed shall so classify themselves by lot that one shall go out of office on the first Monday in January, 1917, one on the first Monday in January, 1918, one on the first Monday of January, 1919, and two on the first Monday in January, 1920. If any vacancy occurs, the Mayor shall fill the same by appointment for the unexpired term, subject to confirmation by a majority of the Council. The Commission shall organize by electing one of its members president, who shall hold office for one year, and until his successor is elected unless his

term as a member of said Commission sooner expires; provided, however, that the president first elected shall hold office until his successor is elected unless his term as a member of said Commission sooner expires; said Commission shall elect a secretary and such other officers as may be necessary and shall hold such meetings at such times and places as it may fix by resolution.

Sec. 2. Said Commission shall have power:

1. To investigate, when requested, or permitted, by the officers or persons in charge thereof all charitable or philanthropic corporations or associations dependent upon public appeal or general solicitations for support, and submit quarterly, in writing, the result of such investigation to the Council.

2. To endorse such of said charitable corporations or associations as shall apply to said Commission for endorsement and prove to the Commission that they have complied with the following provisions, namely:

(a) That the title of any real property in the City of Los Angeles owned by such charitable corporations, or association is vested in the name of such charity, if it be a corporation, or else in the name or names of a responsible trustee or trustees under a declaration of trust or other written instrument setting forth the rights of said charitable corporation or association therein, and recorded in the records of the County Recorder of Los Angeles County.

(b) That the declared purposes for which such a corporation or association is organized are charitable or philanthropic, and not for the pecuniary profit of the members or associates thereof or any of them.

(c) That for three months prior to its endorsement said charitable corporation or association has faithfully complied with the following provisions with reference to its accounts, namely: All funds received by it, and all disbursements made by it, have been entered upon the books of its treasurer or other financial officer, receipts have been given or tendered for all moneys or other property donated to it, whenever required by law or ordinance; all expenditures other than petty cash to a reasonable amount have been made by checks signed by at least two officers of such corporation or association; that the bank book of such association or corporation has been balanced and reconciled with the books of account at reasonable intervals.

(d) That no moneys of said corporation or association are on loan directly or indirectly to any officer, director, trustee or employee thereof, and that the corporation or association for a period of three months prior to its endorsement has not invested any moneys constituting part of its permanent endowment funds except in securities legal as investments for savings banks within the State of California, and has not paid out more than 15% of any amount collected by solicitation within the City of Los Angeles for expense of solicitation, and has not diverted funds donated to it from any source to purposes other than those for which they were donated.

Provided, however, that the provisions of this paragraph shall not apply to any loan or investment that has been made prior to the passage of this ordinance.

(e) That the work for which such corporation or association has been organized has been faithfully performed.

(f) That the by-laws and other written rules and regulations of such corporation or association defined the powers and duties of the officers of such corporation or association, and that a copy of the Articles of Incorporation of said charity, if it be a corporation, and a copy of the By-Laws and other written rules and regulations of such corporation or association have been filed with the Social Service Commission.

(g) That within three months prior to its endorsement such corporation or association has not violated any law or ordinance applicable to it.

(h) That the officers and employees of such corporation or association are persons of good moral character and reputation and that the corporation or association has exercised reasonable care in selecting persons of good moral character and reasonable experience as solicitors for its funds.

Said Commission shall issue said endorsement to any such corporation or association as shall comply with the aforesaid requirements. Said endorsement shall be valid for such time as shall be fixed by the Commission but not exceeding one year from date of its issuance.

Said Commission shall report to the Council upon request by it the name of any corporation or association which is endorsed or has been refused endorsement by it, with a general statement of the reasons for its refusal.

Said Commission shall also have power to request any endorsed corporation or association to make application for a new endorsement at or after the end of each fiscal year or at an earlier period if the Commission shall deem such requirement advisable, and if said corporation or

association shall not so do its endorsement shall be withdrawn.

(3) To encourage the formation of new private charities to meet needs that are not already provided for and to foster all worthy enterprises of a charitable or philanthropic nature.

(4) To collect and preserve statistics relating to charities and unemployment and to suggest means of improving the conditions producing the need of relief.

(5) To maintain a constant survey of the field of charities with regard to the need and the work being done in connection therewith, and to secure intelligent co-operation among all charities in the city to the end that a comprehensive and economical plan in philanthropy may be attained.

(6) To disburse all funds set apart by the City for charitable purposes and to make and file a quarterly report with the City Council of the work done in connection therewith.

(7) To receive donations, gifts or bequests to be used for charitable or philanthropic purposes and to administer any trust declared or created for any such purpose in accordance with the terms of said trust.

Sec. 3. That the Municipal Charities Commission created by Ordinance No. 27,510 (New Series), approved May 6, 1913, is hereby abolished and the terms of office of the members thereof are discontinued, and said Ordinance No. 27,510 (New Series), entitled, "An Ordinance creating a Municipal Charities Commission, and prescribing its powers and duties," approved May 6, 1913, and all ordinances amendatory thereof, be and the same are hereby repealed.

Sec. 4. The City Clerk shall certify to the passage of this ordinance by a unanimous vote and cause the same to be published once in The Los Angeles Daily Journal.

I hereby certify that the foregoing ordinance was introduced at the meeting of the Council of the City of Los Angeles of October 17, 1916, and was passed at its meeting of October 25, 1916.

CHAS. L. WILDE,
City Clerk.

Approved this November 1, 1916.

F. T. WOODMAN,
Mayor.

SUPREME COURT OF THE UNITED STATES

No. 103.—October Term, 1946.

The Gospel Army, a Corporation, Appellant, *v.* The City of Los Angeles, Board of Social Service Commissioners, Department of Social Service, et al.	Appeal from the Supreme Court of the State of California.

[June 9, 1947.]

Mr. Justice Rutledge delivered the opinion of the Court.

This is a companion case to *Rescue Army* v. *Municipal Court of the City of Los Angeles*, 331 U. S. —, decided today. Because we dismiss the appeal in this cause for jurisdictional reasons, the facts may be shortly stated.

The Gospel Army is an incorporated religious organization. The trial court found that it is "engaged exclusively in the promulgation, by literature and word of mouth, of its religious beliefs, by and through its auxiliaries and in the procuring of donations in the form of money and articles of value in the prosecution and furtherance of its religious activities." More particularly, its activities consist of conducting a mission, distributing religious books without charge, giving aid to the poor. It collects salvage which it either sells in a second-hand goods store,[1] distributes directly to the poor, or sends to a salvage mill.[2]

[1] The money received from the sales is used to meet the cost of operating the store, including compensation paid to the manager and to those who solicit contributions. Whatever remains goes into the corporate treasury.

[2] Ninety per cent of the money received for the goods sent to the salvage mill is paid to the drivers of trucks used by the Gospel Army to collect the salvage. The other ten per cent goes into the treasury.

The Gospel Army instituted this suit to enjoin the enforcement of certain ordinances of the City of Los Angeles on the ground that they violate its religious liberty under the Constitutions of California and the United States.[3]

After trial the Superior Court of Los Angeles County broadly concluded:

> "That a permanent injunction should issue herein restraining and enjoining the Defendants and each of them and any and all persons, associations, departments under whom said Defendants or any of them may be employed or acting and any and all persons, associations or departments who may be acting or claiming by, through or under said Defendants, or any of them from the further interference and threatened acts, which would in any way prevent the free exercise of a religious liberty of said Plaintiff."

From this decision an appeal was taken to the District Court of Appeal of the Second Appellate Division, Division Two, and the cause was then transferred to the Supreme Court of California. That court held, three judges dissenting, that the Superior Court's action in granting the injunction was erroneous. 27 Cal. 2d 232. Some, if not all, of the ordinances in suit were sustained as constitutional. On appeal to this Court determination of jurisdiction was postponed to the merits. 329 U. S. —.

The jurisdictional difficulties arise from the form of the California Supreme Court's judgment. That court ended its opinion with the statement, "The judgment is reversed." Its judgment was in the same form: "It is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the County of Los Angeles in the above entitled cause, be and the same

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[3] It is unnecessary to consider precisely what ordinances were involved in this case or were sustained by the California Supreme Court. See *Rescue Army* v. *Superior Court*, 331 U. S. —.

is hereby reversed." In California an unqualified reversal, "that is to say, without direction to the trial court," is effective to remand the case for a new trial and places the parties in the same position as if the case had never been tried." *Erlin* v. *National Union Fire Ins. Co.*, 7 Cal. 2d 547, 549; *Stearns* v. *Aguirre*, 7 Cal. 443, 448; *Central Sav. Bank* v. *Lake*, 201 Cal. 438, 443; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 72; 2 Cal. Jur. § 590.

Under § 237 of the Judicial Code, 28 U. S. C., § 344, only "final judgments" of state courts may be appealed to this Court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court "except the ministerial act of entering the judgment which the appellate court . . . directed." *Department of Banking* v. *Pink*, 317 U. S. 264, 267. Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final.

Increasingly this Court has become less formal in the matter of final judgments. It is no longer the rule that the face of the judgment is determinative of whether it is final.[4] Today "the test is not whether under local rules of practice the judgment is denominated final . . . but rather whether the record shows that the order of the

[4] For cases incorporating the old "face of the judgment" rule, see, *e. g.*, *Bruce* v. *Tobin*, 245 U. S. 18; *Schlosser* v. *Hemphill*, 198 U. S. 173; *Haseltine* v. *Central National Bank*, 183 U. S. 130. There was strong dissent to the abandonment of the rule. See the separate opinion of McReynolds, J., in *Clark* v. *Williard*, 292 U. S. 112, 129. And for general discussion, cf. Boskey, Finality of State Court Judgments under the Federal Judicial Code (1943) 43 Col. L. Rev. 1002, 1003–1008; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1936) 54–57.

appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review in a state court: . . ." *Department of Banking* v. *Pink*, 317 U. S. at 268.

Thus, this term in *Richfield Oil Corp.* v. *State Board of Equalization*, *supra*, despite the fact that the Supreme Court of California had reversed a judgment without directions, we determined on the entire record and upon an independent investigation of California law that the judgment was final for the purposes of § 237. In the first place, the facts had been stipulated and, so far as appeared, the stipulation would have been available and controlling upon a second trial. In the second place, the suit was one for a refund of a tax and under California law only those grounds presented in the prior claim for refund could be urged in the suit. The opinion stated: "Since the facts have been stipulated, and the Supreme Court of California has passed on the issues which control the litigation, we take it that there is nothing more to be decided." 329 U. S. at 73–74.

In this case, however, the facts have not been stipulated, nor are there any special procedural restrictions. Thus, under California law, the Gospel Army on the second trial to which it is entitled may amend its complaint and present new facts. "Such a reversal remands the case for a new trial and places the parties in the same position as if the case had never been tried. . . . Of course, upon a retrial the decision of the appellate court becomes the law of the case upon the facts as then presented. But that law must be applied by the trial court to the evidence upon the second trial. 'It is settled beyond controversy that a decision of this court upon appeal, as [to] a matter of fact, does not become the law of the case.'" *Erlin* v. *National Union Fire Ins. Co.*, 7 Cal. 2d at 549.

We cannot assume that the Supreme Court of California would hold the ordinances in question constitutional no matter what facts might be presented upon a second trial. Indeed, experience demonstrates that particularly in constitutional cases issues turn upon factual presentation.

Accordingly, the case does not fall within the specific holding of the *Richfield Oil* case, for, although the modern rule is that in determining whether the state court's remand is for a new trial this Court will examine both the judgment and the opinion as well as other circumstances which may be pertinent, *Department of Banking* v. *Pink, supra; Richfield Oil Corporation* v. *State Board of Equalization, supra,* this does not mean that in the ordinary case we will disregard the effect of the judgment under the local law. In this case, for example, the effect of the judgment under state practice is to remand the case for a new trial. Nothing in the opinion of the court is to the contrary. We cannot assume that the state court made an error in its judgment, clerical or otherwise. If the parties had thought so, they could have moved to have it amended. Indeed, that course may still be open to them.

The appeal is dismissed.